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SUPREME COURT

OF THE UNITED STATES

LARRY LYNN BLAKNEY,
Petitioner,
-vs-
STATE OF MONTANA,
Respondent.

79-6366

No. _____

ON PETITION FOR A WRIT OF CERTIORARI, TO THE SUPREME COURT OF THE STATE OF MONTANA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, LARRY LYNN BLAKNEY, moves the Court for an Order permitting him to proceed in this Court in forma pauperis with his Petition for a Writ of Certiorari to the Supreme Court of the State of Montana from the judgment of said Supreme Court of the State of Montana entered in this cause on December 13, 1979, with rehearing denied on January 10, 1980.

Petitioner's motion is made pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 53 of the Rules of the United States Supreme Court and in support of his Motion, the affidavit of Petitioner is attached hereto.

SMITH, CONNOR & VAN VALKENBURG
Attorneys for Petitioner

By John P. Connor Jr.
John P. Connor
240 North Higgins
Missoula, Montana 59801

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79-6366

No. _____

AFFIDAVIT OF LARRY LYNN BLAKNEY

United States of America)
:ss
District of Montana)

LARRY LYNN BLAKNEY, being first duly sworn, deposes and says:

1. That he is a citizen of the United States and the Petitioner in the above-entitled action;

2. That he desires to petition for a Writ of Certiorari directed to the Supreme Court of the State of Montana to review the judgment of that Court entered on December 13, 1979 (with rehearing denied on January 10, 1980) pursuant to 28 U.S.C., § 1257(3) but that due to his indigency, he is unable to pay the costs of such proceeding or give security therefor;

3. That since May 22, 1978 Petitioner has been incarcerated in the Montana State Prison and has had no employment or source of income since that time and further, that Petitioner has no assets of any kind except nominal funds provided for toilet and personal needs at the prison;

4. That Petitioner believes he is entitled to the redress sought by his Petition for Writ of Certiorari and that such Petition presents substantial federal questions.

5. That the nature of the questions to be presented by Petition for Writ of Certiorari are as follows:

A. Whether the Supreme Court of Montana denied Petitioner his right to due process of law as guaranteed him by the Fourteenth Amendment to the Constitution of the United States by ruling that the trial court committed harmless error beyond a reasonable doubt in requiring petitioner to prove his confession involuntary.

B. Whether the Supreme Court of Montana, by affirming the trial court ruling that the State had met its heavy burden of showing waiver of right to counsel, effectively ignored Petitioner's right to counsel and right against self incrimination as guaranteed him by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution when the only evidence of waiver was the inconsistent testimony of the interrogating officers.

Affiant contends that the Supreme Court of the State of Montana erred in holding that none of affiant's federally protected rights were violated in the above matters.

WHEREFORE, affiant prays that he be granted leave to proceed in this Court on his Petition for Writ of Certiorari in forma pauperis.

Larry Lynn Blakney

Larry Lynn Blakney

SUBSCRIBED AND SWORN to before me this 19th day of March, 1980.

David M. Scully

(NOTARIAL SEAL)

Notary Public for the State of Montana. Residing at Deer Lodge Montana. My commission expires Nov. 27, 1982.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

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ATTORNEYS FOR PETITIONER

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Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Montana entered December 13, 1979, rehearing denied January 10, 1980.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Montana, reported at _____ Mont._____, 605 P.2d 1093 (1979) is set out in Appendix A, infra, together with the court's order denying rehearing.

JURISDICTION

The judgment of the Supreme Court of Montana was entered on December 13, 1979. On January 10. 1980 that court denied a timely rehearing petition. (See Appendix A-16). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of Montana denied petitioner's

right to due process of law as guaranteed him by the Fourteenth Amendment to the Constitution of the United States by ruling that the trial court committed harmless error beyond a reasonable doubt in requiring petitioner to prove his confession involuntary.

2. Whether the Supreme Court of Montana, by affirming the trial court ruling that the state had met its heavy burden of showing waiver of right to counsel, effectively ignored petitioner's right to counsel and right against self-incrimination as guaranteed him by the Fifth, Sixth, and Fourteenth Amendements to the United States Constitution when the only evidence of waiver presented was the conflicting testimony of the interrogating officers.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and various sections of the Montana Code Annotated as set forth in Appendix C, infra.

STATEMENT OF THE CASE

The nude body of Ann Thibodeau was found in the Clark Fork River near the downtown area of Missoula, Montana on the evening of June 11, 1977. A pathological examination determined that death resulted from strangulation aggravated by ingestion of water into the lungs.

Petitioner Larry Lynn Blakney was at the scene where the body was discovered and was requested to accompany officers to the Missoula City Police Station at approximately 10:30 that evening, June 11, for the purpose of giving a statement. The police interrogation of petitioner commenced at approximately 11:00 - 11:30 p.m. (Tr. Vol. I, p.18). The petitioner, then

18 years of age, was formally interrogated for approximately 1 1/2 hours on that night and the early morning hours of June 12, 1977. Although several family members were present in the police station during this time period, the interrogation was conducted by two city policemen, Officers Ibsen and Weaver, absent the presence of any relative or friend of the petitioner. This isolated type of interview was apparently requested by the police officers to permit a more uninhibited exchange. (Tr. Vol. I, p. 72). A tape recording of the first interview was made and subsequently transcribed. The explanation of rights given by the officers took place before the recorder was turned on (Tr. Vol. I, p. 80) so that the transcription of the statement reflects only that petitioner had signed a waiver of rights. (State's Exhibit 25). During the course of this first statement, petitioner admitted some confusion to the police officers (State's Exhibit 25) and indicated that he was unable to understand certain words contained in the waiver of rights. (Tr. Vol. I, pgs. 25, 80). Following the recorded interrogation, petitioner was taken to his home by the interrogating officers where a search of his car was conducted pursuant to a consent to search. The officers were then shown the interior of his home and broke off contact with him at approximately 2:00 a.m. on June 12, 1977. (Tr. Vol. IV, p. 356). Arrangements were made at that time for petitioner to come into the police station later that morning, at approximately 9:00 or 9:30 a.m. for a second interview. (Tr. Vol. I, p. 84).

This second interview with petitioner commenced at approximately 9:30 a.m. and lasted for a period of 2 - 2 1/2 hours. (Tr. Vol. I, p. 91). The interrogation was also conducted by Officers Ibsen and Weaver in the police interrogation room. Only petitioner and the two officers were present. This interrogation was not transcribed or taped, and a waiver of rights

form was signed by petitioner prior to its commencement. Arrangements were also made during this second interrogation for petitioner to contact police officers the following day, June 13th, to arrange for the taking of a polygraph examination. Although there is inconsistency throughout relative to a request by petitioner for counsel, it is conceded by Officers Ibsen and Weaver and found by the court, that some type of request was made during the interrogation of June 12th, Sunday morning. (Tr. Vol. IV, p. 380; Vol. II, p. 327; Vol. V, p. 613).

Petitioner reported to the police interrogation room on the evening of Monday, June 13th, to undergo a polygraph examination conducted by Cascade County Deputy Sheriff Sand. The examination commenced at approximately 9:00 p.m. and was conducted in the presence of four police officers, including the examiner. (Tr. Vol. IV, p. 442). Petitioner's uncle had accompanied him to the police station but was not permitted to be present during the examination. The entire examination procedure took approximately one hour. (Tr. Vol. I, p. 151). Following this, results of the examination were discussed with petitioner and he was advised that the test disclosed untruthfulness. (Tr. Vol. I, p. 154). Ibsen and Weaver then immediately began another interrogation of petitioner (Tr. Vol. I, p. 104-5) and during the course of this third interrogation, occurring from approximately 10:00 p.m. until midnight (Tr. Vol. I, p. 151; Vol. V, p. 546) in the police interrogation room, he admitted having killed Ann Thibodeau. The petitioner had no family members present and was not represented by counsel. (Tr. Vol. I, p. 110). Although the record is again unclear on this aspect, it is conceded by both Officers Ibsen and Weaver, as well as by petitioner, that some type of request for counsel, (Tr. Vol. II, p. 285), was made by petitioner during some point

in the Monday night interrogation. The district court also found in its Findings of Fact and Conclusions of Law that petitioner brought up the matter of counsel on Monday night before confessing. There are substantial discrepancies in the testimony relative to this matter which will be noted later. In any event, the third interrogation was not taped or transcribed. (Tr. Vol. II, p. 276).

That interrogation was followed by a fourth, conducted in the same room. Present for this interrogation were petitioner, Officer Ibsen and Officer Scott Graham who had replaced Weaver at Weaver's request because he felt emotionally drained. (Tr. Vol. I, p. 106). There was no appreciable break taken between the third and fourth interrogations. A "rights form" was read to petitioner by Officer Graham and the interview was tape recorded and later transcribed. Petitioner was then formally placed under arrest for deliberate homicide at approximately 1:30 a.m. on the morning of June 14, 1977. (Tr. Vol. V, p. 632).

A further statement was given by petitioner on the night of June 15, 1977. This statement, which was also recorded and transcribed, was delivered in the Missoula County Jail in the presence of three police officers and petitioner's mother. (See State's Exhibit 28). It essentially repudiates the earlier confession.

An information was filed by leave of court on August 1, 1977 charging petitioner with the offense of deliberate homicide. Following several procedural delays not germane to the instant consideration, a motion to suppress the confessions or admissions of petitioner was filed.

During the suppression hearing, the interrogating officers were called by both petitioner and the state. Their testimony relative to petitioner's request for counsel and alleged waiver

of that request varied considerably. During direct examination by petitioner, Officer Ibsen testified that after petitioner had given a statement on Monday night, June 13th, admitting having killed the victim, but before his taped confession to that effect, he said that "he thought he wanted an attorney." At that point according to Ibsen, questioning stopped and did not begin again until petitioner began offering information. (Tr. Vol. I, pgs. 59-62). No recording was made of this statement. Later, during direct examination by the state, Officer Ibsen testified that the statement was a definite request for an attorney (Vol. II, p. 286) but that petitioner verbally repudiated that request after being examined about it by Officer Weaver, and that no further request for counsel was made. (Tr. Vol. II, p. 289).

Officer Weaver, on the other hand, testified during the suppression hearing when called by petitioner that petitioner stated "maybe I should see a lawyer" which triggered in his mind the possibility that he may have wanted "to exercise his rights", but that the interrogation was unilaterally continued by petitioner when he began talking again. (Tr. Vol. I, pgs. 107-10). Contrary to Ibsen's testimony, Weaver stated at this point in the suppression hearing that the assertion was made before any admission or confession was given by petitioner on Monday night. (Tr. Vol. I, p. 1027). Then, however, during direct examination by the state some nine days later, Officer Weaver remembers two assertions of right to counsel being made by petitioner, the first during the Sunday morning interrogation and the second on Monday night. (Tr. Vol. II, pgs. 327-28). By now though, he remembers only the particulars of the Sunday morning assertion and, contrary to his earlier testimony, not the one made Monday night. (Tr. Vol. I, p. 328). Officer Weaver recollects that on both occasions, petitioner made the

assertion, paused, and then simply began offering information again. In cross-examination, Weaver claimed that in describing the incident relative to counsel on direct some days earlier, he had been referring to the Sunday morning episode, (Tr. Vol. II, p. 337), despite the fact that during that earlier examination counsel had prefaced his inquiry by stating, "At any time subsequent to completing the polygraph examination . . . ." (Tr. Vol. I, p. 107), the polygraph occuring only on Monday night. (emphasis added).

The petitioner testified during the suppression hearing that he requested an attorney before making his admission on Monday night. (Tr. Vol. I, p. 193).

The court thereafter denied petitioner's motion to suppress and entered findings of fact and conclusions of law to that effect on November 21, 1977. See Appendix B.

Trial commenced April 3, 1978. During trial, held some five months after the suppression hearing, substantial changes occurred in the officers' testimony relative to how and when assertion of the right to counsel was made. Now Officer Ibsen recollects that a request for counsel was made on Sunday morning, and even remembers the point during the interview when the request was made. (Tr. Vol. V, p. 613). No mention is made of a Monday night request. Officer Weaver recollects now that an assertion (less direct than that remembered by Ibsen) was made Sunday morning, during the second interrogation, but that no assertion whatever was made Monday night, totally contrary to his earlier testimony. Both officers do, however, remember that no matter how the request was phrased, it was, in effect, repudiated by petitioner when he began talking with no prompting from the officers.

A verdict of guilty to the charge of deliberate homicide was returned on April 11, 1978 and judgment was entered on

May 22, 1978 sentencing petitioner to forty years in the Montana State Prison.

The case was submitted on appeal September 13, 1979 with a decision issuing December 13, 1979. Petitioner's request for rehearing was denied January 10, 1980.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

ISSUE NO. 1.

Petitioner's motion to suppress the confessions or admissions filed with the trial court provided, in part:

> "The State has the burden of proving the Defendant waived his constitutional rights knowingly, intelligently and voluntarily. . . . The State. . .cannot constitutionally shift the burden of proof to the Defendant to show how his rights were violated, rather the State must affirmatively show the Defendant's rights were not violated. Further, the facts stated in this motion shift the burden to the State."

Motion to Suppress, p. 5.

At the outset of the suppression hearing, petitioner argued that the state had the burden of proving the confessions were voluntarily given, despite the provisions of Section 95-1805, Revised Codes of Montana, 1947 (now 46-13-301 MCA) which provided in pertinent part:

> "(a) A defendant may move to suppress as evidence any confession given by him on the ground that it was not voluntary.
>
> * * *
>
> "(f) The burden of proving that a confession or admission was involuntary shall be on the defendant."

Petitioner cited to the court Miranda v. Arizona, 384 U.S. 436 (1966). The state maintained that the above-quoted statute placed the burden on petitioner to show involuntariness. The record demonstrates the following scenario prior to the

trial court ruling for the state:

> (1) Defense counsel objects to proceeding with the burden of showing the confessions involuntary, citing authority. (Tr. Vol. I, p. 1).
>
> (2) The state rebuts the argument by stating that under "the Montana Code the burden is upon the defense" to show the confessions were involuntary. (Tr. Vol. I, p. 2).
>
> (3) Defense counsel then again argues its same position to which the state responds by encouraging an interpretation on the court that the defense bears the burden in the suppression hearing, while the state may bear the burden in trial. (Tr. Vol. I, pgs. 4-5).
>
> (4) The court agrees with the interpretation just articulated by the state. (Tr. Vol. I, p.5).

On appeal petitioner challenged the ruling of the trial court as being violative of petitioner's constitutional right to due process of law as guaranteed him by the Fourteenth Amendment to the United States Constitution. State v. Blakney, 605 P.2d 1098 (1979). The Montana Supreme Court held that the statute requiring a defendant to carry the burden of proof in a suppression hearing was indeed unconstitutional, as had been alleged by petitioner, on the basis of Lego v. Twomey, 404 U.S. 477 (1972). The court also held that the trial court erred in relying on this statute and requiring petitioner to prove the confessions involuntary but that such error constituted harmless error beyond a reasonable doubt. In so holding, the court stated:

> "However, we find here that even though the trial court's ruling did shift the burden, the ruling can be sustained as harmless error. The error here is federal constitutional error.
>
> * * *
>
> "In determining the existence of harmless constitutional error, the appellate court considering the question has the task of applying the harmless beyond a reasonable doubt test. (citing authority).
>
> "Applying this standard to the instant case, we find the error was harmless beyond a

reasonable doubt."

Blakney, 605 P.2d at 1099, 1100.

ISSUE NO. II.

In his motion to suppress, petitioner also argued that the confessions of petitioner were

> "not voluntarily made and. . .obtained in violation of the Defendant's Constitutional rights as guaranteed by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article II, § 17, § 23, § 24 and § 25 of the 1972 Montana Constitution. . . ."

Motion to Suppress, p. 1.

Petitioner further argued that

> "[The Defendant requested an attorney during the interrogation session of Monday evening, June 13, 1977, prior to giving any statements]. The police either ignored or refused to grant the Defendant's request and proceeded with the interrogation process. The Defendant's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article II, § 17 and § 24 of the 1972 Montana Constitution was thereby denied, as the police knew or should have known that upon the Defendant's request all questioning and interrogation must stop."

Motion to Suppress, pgs. 4-5.

In denying petitioner's motion to suppress, the trial court, in its findings of fact and conclusions of law, held the confessions to have been voluntarily made, that in fact no effective assertion of right to counsel was ever made by petitioner and that, in any event, he knowingly and intelligently waived his right to counsel. The court did find, however, that petitioner had requested an attorney on two occasions during the various interrogations. Appendix B, infra.

The confessions were introduced during the trial over the objections of counsel for petitioner. (Tr. Vol. V. p. 594). On appeal petitioner argued that the ruling relative to assertion and waiver of right to counsel amounted to a denial

of petitioner's right to counsel and against self-incrimination in derogation of the guarantees afforded him by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. State v. Blakney, 605 P.2d 1096 (1979).

In ruling on the question of whether the state had met what the Montana Supreme Court recognized as its heavy burden of showing waiver of right to counsel once such right is asserted, the court held first of all that the petitioner had made an effective assertion of right to counsel and that the trial court erred in ruling otherwise, but that petitioner waived this right and the trial court had found correctly on that matter. In this regard the court stated:

> "Given this standard and the District Court's findings of fact, the District Court did not err in holding appellant waived his right to counsel."
>
> * * *
>
> "These facts. . .and the express statement by appellant that he did not want a lawyer - represent a waiver of the right to counsel on the part of appellant."

Blakney, 605 P.2d at 1098.

Thus the Montana Supreme Court accepted without question and indeed without discussion, the substantially conflicting testimony of the interrogating officers, the only testimony offered by the state in support of its constitutionally required heavy burden of proof regarding waiver.

I.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MONTANA SUPREME COURT DENIED PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED HIM BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY RULING THAT THE TRIAL COURT COMMITTED HARMLESS ERROR BEYOND A REASONABLE DOUBT IN REQUIRING PETITIONER TO PROVE HIS CONFESSION INVOLUNTARY.

It is well settled, and has been for the past several

Lon's

years, that the state has the burden of proving a confession voluntary. Lego v. Twomey, 404 U.S. 477 (1972). Although the Montana statute, Section 95-1805, R.C.M., 1947, required the defendant to prove involuntariness, the Montana Supreme Court had effectively ignored the directives of this statute by holding, in earlier cases, that the burden rested with the State to show voluntariness. See State v. Smith, 164 Mont. 334, 523 P.2d 1395 (1974); State v. White, 146 Mont. 21, 515 P.2d 76 (1973). The question of whether § 95-1805, R.C.M., 1947, was constitutionally acceptable was never directly addressed by the earlier decisions, however, and apparently did not become an issue until raised in the instant case. As noted earlier, the question of the application of this statute became an issue early on when petitioner argued during the suppression hearing that the state had the burden of proving that the confessions were in fact voluntarily made, citing authority to support such position. The state argued that the statute in question placed the burden instead upon petitioner to show that the confessions were involuntarily given. (Tr. Vol. I, pgs. 2-5). In ruling consistent with the state's argument the trial court stated:

> "Well it appears to me that what you (county attorney) say is true. Mr. Volinkaty, at the trial, if they wish to introduce this at the trial, the burden is on the state to prove voluntariness; however, this is a Motion to Suppress and I think that, since it is your Motion, you should proceed at this time."

Tr. Vol. I, p. 5.

The Montana Supreme Court in holding that the trial court erred in requiring petitioner to carry the burden of proof, also determined that the error was "federal constitutional error" citing Lego v. Twomey, 404 U.S. 477 (1972) and Jackson v. Denno, 378 U.S. 368 (1964). The court, however,

then proceeded to a determination that such error constituted harmless error beyond a reasonable doubt, citing Chapman v. California, 386 U.S. 18 (1967).

In relying on Chapman, the Montana court glosses over the real significance of the case since Chapman actually provides rather narrow strictures in allowing a determination of harmless error beyond a reasonable doubt. In quoting favorably from the earlier decision of Fahy v. Connecticut, 375 U.S. 85 (1963), the Court in Chapman states:

> "We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. Connecticut, . . . There we said 'the question is whether there is a reasonable possibility that evidence complained of might have contributed to the conviction.'"

386 U.S. at 25.

In utilizing the Fahy standard, this Court further stated, addressing its consideration to the evidentiary particulars of Chapman:

> "And though the case in which this occurred presented a reasonably strong 'circumstatial web of evidence' against petitioner, . . . it was also a case in which, absent constitutionally forbidden comments, honest fair-minded jurors might very well have brought in not-guilty verdicts."

386 U.S. at 26.

The Court in Chapman also recognizes that certain constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23. Examples of such rights noted by the Court are right to counsel and right against the use of a coerced confession. In this regard the Court cites Payne v. Arkansas, 356 U.S. 560 (1958). In Payne, the Court found that petitioner's confession had been coerced and in response to the state's argument that despite the confession, there existed sufficient evidence to convict, the Court stated:

> "And in these circumstances this Court has uniformally held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."

356 U.S. at 568.

The rationale for this holding, and for the narrow construction given to the application of harmless error beyond a reasonable doubt in Chapman was apparently overlooked by the Montana courts. If an appellate court is permitted to speculate as to the probable outcome of a case where a constitutional right has been ignored, and decide the case on the basis of such speculation, the result is to render the constitutional guarantee meaningless and to vitiate the substance of such guarantee.

In Montana the rule has long been that the question of voluntariness of a confession is a matter within the sound discretion of the trial court and its decision will not be reversed on appeal unless clearly against the weight of the evidence. The Montana court cited this rule in deciding petitioner's case when it quotes approvingly from the case of State v. Grimstead, _____Mont._____, 598 P.2d 198 (1979). However, the court then proceeded to speculate as to what the trial court might have done were it to have utilized a correct constitutional standard. To simply conclude, as does the Montana Supreme Court, that the federal constitutional error was harmless because the evidence was so substantial that the trial court would have ruled the same way utilizing a proper standard, can only be styled cavalier in its disregard of the essence of constitutional protections. The type of speculation indulged by the Montana Supreme Court should be purely academic. The point, of course, is that the trial court's

discretion was moved by adherence to an unconstitutional standard and, as such, it should have been reversed.

In support of the tack it took, the Montana Supreme Court places heavy reliance on Rogers v. United States, 330 F.2d 535 (5th Cir. 1964), cert. denied, 379 U.S. 916. The Montana court quotes the following from Rogers:

> ". . .[T]he burden of producing evidence is never crucial unless certain necessary facts in a case are not aired. Here all of the salient facts were aired. . . . 330 F.2d at 543."

Blakney, 605 P.2d at 1100.

In relying on the reasoning of this case, the Montana Supreme Court overlooked two salient factual distinctions between Rogers and the instant case. The first is that although the trial judge ruled in Rogers that the defendant had the burden of proof in the suppression hearing, he withdrew that ruling following the hearing and ruled that, even giving the defendant the benefit of the doubt, he would not have suppressed the evidence. More importantly, the second distinction is that Rogers was decided prior to this Court's decision in Lego v. Twomey, 404 U.S. 477 (1972).

Petitioner submits that the Montana Supreme Court's decision on this issue constitutes acquiesence in a trial court ruling the effect of which was to place an involuntary confession before the jury. The confession was presumptively involuntary when the suppression proceeding began and it emerged involuntary since petitioner was required to prove it so. In utilizing the standard of Fahy v. Connecticut, 375 U.S. 85 (1963), there is certainly little doubt that the admission of the confessions, the essence of the state's evidence against petitioner, resulted in a "reasonable possibility [the confessions] might have contributed to the conviction." 375 U.S. at 172.

II.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SUPREME COURT OF MONTANA, BY AFFIRMING THE TRIAL COURT RULING THAT THE STATE HAD MET ITS HEAVY BURDEN OF SHOWING WAIVER OF RIGHT TO COUNSEL, EFFECTIVELY IGNORED PETITIONER'S RIGHT TO COUNSEL AND RIGHT AGAINST SELF-INCRIMINATION AS GUARANTEED HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSITUTION, WHEN THE ONLY EVIDENCE OF WAIVER PRESENTED WAS THE CONFLICTING TESTIMONY OF THE INTERROGATING OFFICERS.

It is well settled that courts indulge in every reasonable presumption against waiver of the right to counsel. Brookhart v. Janis, 384 U.S. 1 (1966); Glasser v. United States, 315 U.S. 60 (1942). It is equally well settled that when the state asserts waiver of the right to counsel, it bears a heavy burden of showing such waiver. North Carolina v. Butler, 441 U.S. 369 (1979); Brewer v. Williams, 430 U.S. 387 (1977); Miranda v. Arizona, 384 U.S. 436 (1966). Indeed, the Montana Supreme Court recognizes the requirement that the state bears a heavy burden with the following explicit language from State v. Blakney:

> "In so doing, we recognize that a waiver of the right to counsel cannot be presumed and that the State bears a heavy burden to show waiver. . . ." (citations omitted)

605 P.2d at 1097.

The Montana court, in reaching its conclusion that the trial court did not err in ruling that petitioner waived his right to counsel, directed brief attention to the question of utilizing a per se rule relative to whether one can waive the right to counsel after making the assertion. In a definite, albeit cursory holding, the court rejected the per se concept. Blakney, 605 P.2d at 1097. The issue is worthy of discussion here, however, since the instant case involves a recognition by the Montana Supreme Court that petitioner made two effective assertions of right to counsel during the interrogation process.

There is a divergence of authority among various states and judicial circuits relative to the question of whether a defendant who has invoked a right to counsel may subsequently waive such right without having consulted counsel. This Court has never squarely addressed the issue although the concept of a per se rule was rejected by the Court in a case questioning the admissibility of inculpatory statements made in the absence of explicit waiver of the right to counsel. North Carolina v. Butler, 441 U.S. 369 (1979). However, this case neither involved an issue of assertion of the right to counsel nor waiver once assertion has been made.

The per se position as it applies to the facts of the instant case, has been supported in the fifth circuit as evidenced by the court's decisions in United States v. Massey, 550 F.2d 300 (5th Cir. 1977) and United States v. Priest, 409 F.2d 491 (5th Cir. 1969). The essence of these decisions is clearly demonstrated in the following language from United States v. Priest:

> "Once warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questions, that he wishes to remain silent, the interrogation must cease."

409 F.2d at 493.

This view is construed as too narrow by the ninth circuit, sitting en banc, in United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir. 1978), saying a

> ". . .per se rule, however disguised, would serve only to handcuff our law enforcement officers in the performance of their duties and to imprison the suspect in his alleged constitutional privileges."

569 F.2d at 488.

It is interesting to note, however, that even after this decision, the ninth circuit doesn't appear completely comfortable with the Rodriguez-Gastelum rule, as it would seem from

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the following language in the subsequent case of United States v. Nick, 604 F.2d 1199 (9th Cir. 1979):

> "But for United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir. en banc 1978), we may have decided that the Government fell short of sustaining its heavy burden. But fidelity to Rodgriguez-Gastelum requires us to support the district court on the waiver point."

604 F.2d at 1201.

See also: People v. Cunningham, _____N.E.2d_____, 48 Law Week 2537 (N.Y. 1980); State v. Stone, 397 A.2d 989 (Me. 1979); Witt v. State, 342 So.2d 497 (Fla. 1977); Loomis v. State, 551 S.W.2d 546 (Ark. 1977).

The Montana Supreme Court's flat rejection of the per se concept ignores the fact that the instant case presents the most cogent set of circumstances that might be advanced in support of such rule. Here the only evidence offered by the state in support of its heavy burden of showing waiver was the testimony of the interrogating officers. The Montana Supreme Court placed repeated emphasis on the recollections of those officers in concluding that petitioner effectively waived his rights. Blakney, 605 P.2d at 1098. The court's decision refers to the specific recollections of the very same officers who couldn't even recall the days on which the assertions of right to counsel were made but ironically could recollect with detailed clarity the scenario on one or both occasions (depending on which version one reads of their testimony) regarding how and when waiver supposedly occurred. If any plausible argument can be advanced in support of the so-called per se rule it is that its adoption would eliminate the type of situation which occurred in the instant case; the substantial difficulty and prejudicial effects of assessing the credibility of contradictory, conflicting and impeachable

testimony relating to waiver.

Favorable determination of this issue need not rest on adoption of the per se rule, however, since the record contains ample evidence of the fact that the interrogation process resulted in anything but an intelligent, understanding rejection of petitioner's right to counsel. It is also clear that the only evidence offered by the state in support of its heavy burden is fraught with inconsistencies and riddled with multiple contradictory explanations of when the assertion was made. Such evidence would hardly seem acceptable to this Court on the basis of the standard established in Brewer v. Williams, 430 U.S. 387 (1977):

> "The District Court and the Court of Appeals were also correct in the understanding of the proper standard to be applied in determining the question of waiver as a matter of Federal Constitutional Law - that it was incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" (citations omitted).

430 U.S. at 403.

Petitioner submits that the Montana Supreme Court gave short shrift to the essence of petitioner's constitutional guarantees against self-incrimination and right to counsel in reaching its decision on this matter. The court paid little heed to the weight and nature of the evidence and simply issued a conclusion. This type of decision seems to be what this Court was contemplating when it stated:

> "The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not. The crime of which Williams was convicted was senseless and brutal, calling for swift and energetic action by the police. . . . No mission of law enforcement officials is more important. Yet, '[d]isinterested zeal for the public good does not assure either wisdom or right in the method it pursues.' Although we do

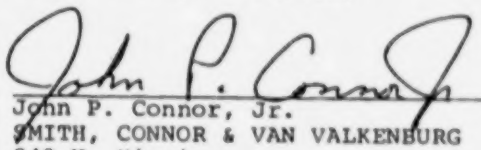
> not lightly affirm the issuance of a writ of habeas corpus in this case, so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned. The pressures on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of those pressures that makes imperative a resolute loyality to the guarantees that the Constitution extends to us all."

Brewer, 430 U.S. at 405-6.

CONCLUSION

For the foregoing reasons, it is submitted that the Montana Supreme Court has, in State v. Blakney, supra, decided significant federal questions contrary to applicable decisions of this Court and petitioner therefore requests that a petition for a writ of certiorari be granted.

Respectfully submitted,



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Attorneys for Petitioner

STATE of Montana, Plaintiff and Respondent,

v.

Larry L. BLAKNEY, Defendant and Appellant.

No. 14534.

Supreme Court of Montana.

Submitted Sept. 13, 1979.

Decided Dec. 13, 1979.

Rehearing Denied Jan. 10, 1980.

Defendant was convicted in the Fourth District Court, Missoula County, Jack L. Green, J., of deliberate homicide, and he appealed. The Supreme Court, Harrison, J., held that: (1) trial court's finding that defendant's confession was voluntary did not clearly contravene the weight of the evidence; (2) defendant waived his right to counsel during interrogation by police officers; (3) trial court did not err in requiring defendant to present his evidence first at suppression hearing; (4) trial court erred in requiring defendant to prove that his confession was involuntary at suppression hearing; however, such error was harmless; and (5) evidence, including defendant's confession, when viewed in a light most favorable to the State, sustained defendant's conviction.

Judgment affirmed.

Sheehy, J., dissented and filed opinion.

Shea, J., dissented and filed opinion.

1. Criminal Law ⇐519(1)

In determining the voluntariness of a confession, the totality of circumstances surrounding the confession is considered with no single fact being dispositive of the issue.

2. Criminal Law ⇐532

When youthful defendant questioned voluntariness of confession to deliberate homicide, court was required to consider following circumstances: accused's age; his education; his knowledge as to both substance of the charge, if any had been filed, and nature of his rights to consult with attorney and remain silent; whether he was held incommunicado or allowed to consult with relatives, friends or an attorney; whether he was interrogated before or after formal charges had been filed; methods used in interrogation; length of interrogations; whether accused refused to voluntarily give statements on prior occasions; whether he repudiated an extrajudicial statement at later date; his mental capacity; visibility of nude pictures of murder victim during interrogation; use of polygraph examinations; accused's previous experience with criminal justice system; and his experience in the adult world.

3. Criminal Law ⇐531(3)

In prosecution for deliberate homicide, trial court's finding at suppression hearing that defendant voluntarily confessed to the crime did not clearly contravene the weight of the evidence.

4. Criminal Law ⇐412.2(5)

Defendant, who while being interrogated by police in regard to a murder stated "maybe I should have an attorney" effectively asserted his right to counsel. U.S.C.A.Const. Amend. 6.

5. Criminal Law ⇐412.2(5)

Defendant may waive his right to counsel after making an effective assertion of the right; however, waiver of such right to counsel cannot be presumed and state bears the heavy burden to show waiver on the part of defendant. U.S.C.A.Const. Amend. 6.

6. Criminal Law ⇐412.2(5)

Defendant, who while being interrogated by police effectively asserted his right to counsel and, after being advised by police that he could have counsel if he wished, continued answering questions, voluntarily abandoned his right to counsel and unilaterally resumed the interrogation without prompting by interviewing officers. U.S.C.A.Const. Amend. 6.

7. Criminal Law ⇐412.2(5)

Defendant, who asserted his right to counsel during interrogation by police and, when police stopped questioning him and began to leave the room, resumed talking to police and, when reminded of his request for counsel, stated that he did not want a lawyer, waived his right to counsel, particularly in view of fact that he had asserted and voluntarily abandoned his right to counsel in an interview 30-hours earlier, following which he was not detained and was free to consult with family members or an attorney if he wished, and that prior to the later interrogation he again received his *Miranda* warnings and signed a waiver. U.S.C.A.Const. Amend. 6.

8. Criminal Law ⇐531(3)

State must prove voluntariness of a confession at a suppression hearing by a preponderance of the evidence. MCA 46-13-301(4).

9. Criminal Law ⇐1141(1)

Error by the trial court cannot be presumed but must be shown by the record.

10. Criminal Law ⇐532

At hearing to suppress confession on ground that it was involuntary, trial court did not err in requiring defendant to present his evidence first; however, such procedure could not be recommended as standard practice at suppression hearings; such procedures should be employed only when necessary to establish prima facie case of constitutional infringement by state.

11. Criminal Law ⇐394.6(1)

If a prima facie case of constitutional infringement by state is presented by party requesting suppression of evidence to trial court's satisfaction in prehearing documentation, state should be required to initiate suppression hearing proceedings.

12. Criminal Law ⇐531(1), 1168(1)

At hearings to suppress confession on ground that it was involuntary, trial court erred in requiring defendant to prove his confession involuntary; however, such error was harmless, even though trial court's ruling improperly shifted the burden of proof to defendant, inasmuch as Supreme Court was convinced beyond a reasonable doubt that trial court would have reached the same result regardless of the improper placing of the burden of proof on defendant.

13. Criminal Law ⇐1162

While not all errors of constitutional magnitude call for reversal, before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

14. Criminal Law ⇐1162

In determining the existence of harmless constitutional error, appellate court considering the question has task of applying the harmless beyond a reasonable doubt test.

15. Homicide ⇐250

In prosecution for deliberate homicide, evidence, including defendant's confession, when viewed in the light most favorable to the state, sustained defendant's conviction.

Smith, Connor & Van Valkenburg, Missoula, John P. Connor, Jr., argued, Missoula, for defendant and appellant.

Mike Greely, Atty. Gen., Helena, Mary B. Troland, Asst. Atty. Gen., Helena, Robert L. Deschamps III, County Atty., argued, Missoula, for plaintiff and respondent.

HARRISON, Justice.

Defendant-appellant was arrested on the charge of deliberate homicide on June 14, 1977, after police had obtained a confession, the product of several interrogations. Appellant thereafter moved to suppress the confession because it was involuntary. The District Court, however, found the confession voluntary, denied the motion and set trial in the matter. Appellant was convicted of the charge and sentenced to forty years in the Montana state prison. From this conviction he appeals.

At approximately 9:00 p. m. on Saturday, June 11, 1977, police found the body of Ann Thibodeau in the Clark Fork River near the

downtown area of Missoula, Montana. Ms. Thibodeau had apparently been strangled and thrown into the river, her death resulting from strangulation aggravated by the ingestion of water into the lungs. On investigation police learned that Ms. Thibodeau spent the evening of June 10, 1977, with appellant and several other young people. During the evening, they drove around Missoula in appellant's car, stopping at various times to pick up some hidden beer, to "park," and to check on some parties.

As the night progressed, appellant took his passengers home, dropping off the last one except Ann Thibodeau shortly before midnight. At trial, as well as when first interviewed by the police, appellant testified he then took Ms. Thibodeau home. In a confession made to Missoula police, however, appellant stated he and Ms. Thibodeau parked by a bridge near the Clark Fork River after dropping off the last of their companions. Appellant said he became angry with Ms. Thibodeau for being unfaithful to his brother, whom she had been dating, and suddenly strangled her. Thinking she was dead, he dragged her from his car and slid her off the bridge into the river.

Officers questioned appellant concerning Ms. Thibodeau's death on four occasions: Saturday, June 11, at 11:00 p. m. for approximately one and one-half hours; Sunday, June 12, at 9:30 a. m. for approximately two and one-half hours; Monday, June 13, at 10:00 p. m. for approximately two hours; and Tuesday, June 14, at 12:10 a. m. for approximately one and one-half hours. In addition to these interrogations, appellant consented to a search of his car and a polygraph examination. Officers conducted the car search after the first interrogation at approximately 1:00 a. m. on Sunday, June 12. The search revealed appellant's car had been recently cleaned. The polygraph examination was conducted on Monday, June 13, between the second and third questioning sessions. The examination indicated some untruthfulness in appellant's prior statements. Appellant confessed during the third interview. The fourth interview consisted of a taping of essentially the same confession.

Prior to each interview, appellant was advised of his rights and signed waivers respecting his rights. During the interviews, pictures of the nude body of the victim were exposed on the table of the interrogation room. The interviews were conducted with only appellant and the interviewing officers present in the room. Members of appellant's family were present in the hall outside the interview room. Appellant was not confined between interviews.

Appellant was 18 years of age at the time of the interviews. At the suppression hearing, two expert witnesses testified appellant had a learning disability and probably could not understand his rights as presented on the waiver forms used by the police. There was additional testimony that appellant had an IQ of 94, had completed the eighth grade, had passed most of the high school equivalency exam, had taken vo-tech classes in Butte, and had worked in his father's business.

Discrepancies exist as to whether appellant made a request for counsel. It is agreed that appellant brought up the subject of counsel during at least one of the questioning sessions. The testimony conflicts, however, as to when appellant mentioned an attorney, what appellant said about wanting an attorney, and the conduct of the interviewers and appellant after the mentioning of counsel.

Appellant states he requested counsel and one was not provided. One of the officers questioning appellant recalled that appellant asked him if he thought he should talk with a lawyer and the officer responded that it was up to appellant. Both questioning officers agree that appellant voluntarily resumed the interview after the mentioning of counsel. No counsel was provided for the appellant during the interrogation process.

On Wednesday, June 15, 1977, appellant called police officers and family members to the Missoula County jail where he was being held and repudiated the statements he had made on the 13th and 14th, stating he

saw someone else murder Ms. Thibodeau. At the suppression hearing and trial, appellant withdrew this repudiation and returned to his original story of dropping off the victim at her home about midnight.

Appellant raises three issues on appeal:

1. Did the District Court err in failing to grant the motion to suppress appellant's confession?

2. Does section 46-13-301(4), MCA, requiring a defendant on a motion to suppress to prove that a confession was involuntary, constitute a denial of due process in violation of the United States and Montana Constitutions?

3. Did the State present sufficient evidence during the trial to support a guilty verdict on the charge of deliberate homicide?

[1, 2] To resolve the first issue presented here, we must decide if the District Court erred in finding appellant's confession voluntary and if appellant was unconstitutionally denied his right to counsel. To determine the first aspect of this issue, the voluntariness of the confession, we must consider the "totality of circumstances" surrounding the confession with no single fact being dispositive of the issue. *State v. Grimestad* (1979), Mont., 598 P.2d 198, 202, 36 St.Rep. 1245, 1251; *State v. Lenon* (1977), Mont., 570 P.2d 901, 906, 34 St.Rep. 1153, 1157. When, as here, a youthful defendant questions the voluntariness of a confession, the circumstances the Court must consider include:

". . . 1) age of the accused; 2) education of the accused; 3) knowledge of the accused as to both the substance of the charge, if any has been filed, and the nature of his rights to consult with an attorney and remain silent; 4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney; 5) whether the accused was interrogated before or after formal charges had been filed; 6) methods used in interrogation; 7) length of interrogations; 8) whether vel non the accused refused to voluntarily give statements on prior occasions; and 9) whether the accused has repudiated an extra judicial statement at a later date . . . ." *West v. United States* (5th Cir. 1968), 399 F.2d 467, 469, cert. denied, 393 U.S. 1102, 89 S.Ct. 903, 21 L.Ed.2d 795.

We should also consider the mental capacity of the defendant, *Smallwood v. Warden, Maryland Penitentiary* (4th Cir. 1966), 367 F.2d 945, cert. denied, 386 U.S. 1022, 87 S.Ct. 1374, 18 L.Ed.2d 460; the visibility of nude pictures of a murder victim during the defendant's interrogation, *People v. Roberts* (1966), 3 Mich.App. 605, 143 N.W.2d 182, 185; the use of polygraph examinations, *Keiper v. Cupp* (9th Cir. 1975), 509 F.2d 238, 241; a defendant's previous experience with the criminal justice system, *United States v. Glasgow* (9th Cir. 1971), 451 F.2d 557, 558; and, a defendant's experience in the adult world, *United States v. Hilliker* (9th Cir. 1970), 436 F.2d 101, 102-03, cert. denied, 401 U.S. 958, 91 S.Ct. 987, 28 L.Ed.2d 242 and *West v. United States*, supra. These are all factors courts have taken into account in deciding if a young person voluntarily confessed.

One additional rule aids us in deciding this case. We stated in *Grimestad*:

". . . The issue of voluntariness of a confession is largely a factual determination, addressed to the discretion of the trial court . . . The trial court's judgment as to voluntariness of a confession will not be reversed on appeal unless it is clearly against the weight of the evidence." 598 P.2d at 202, quoted from *State v. Lenon*, 570 P.2d at 906.

[3] The trial court here reviewed the evidence and determined appellant voluntarily confessed. In considering almost every one of the factors listed above as relevant in determining the voluntariness of appellant's confession, evidence exists supporting the holding of the District Court.

Appellant was 18, legally an adult. He had passed most of his high school equivalency examination and attended vo-tech school. Appellant's IQ is 94, within the normal adult range. The trial judge found that appellant demonstrated an under-

standing of the English language during his courtroom testimony. Appellant had worked in his father's business. Appellant had prior experience with the criminal justice system, having previously been advised of his rights in connection with juvenile matters. The four interrogation sessions lasted only about two hours each and were spread out over several days. Between sessions, appellant went home, free to consult with family members and move about as he pleased. The District Court found that the polygraph procedure did not intimidate appellant. Appellant stated at the suppression hearing that he did not pay much attention to the pictures of the victim left exposed on a table during the questioning. Appellant repudiated his confession, placing blame for the murder on someone else, but later returned to his original story of dropping off the victim at her home.

Although some evidence to the contrary exists, the above facts show the decision of the District Court does not clearly contravene the weight of the evidence. We must, therefore, affirm the District Court's ruling on the voluntariness of appellant's confession.

[4] Speaking to the second aspect of this issue, whether appellant was unconstitutionally denied his right to counsel during the interrogation process, the District Court concluded:

"That the defendant never made an effective assertion of counsel and in any event thereafter knowingly and intelligently waived the presence of counsel by spontaneously stating he did not want a lawyer and resuming talking to the police."

This conclusion raises two questions for consideration on appeal: (1) Did appellant effectively assert his right to an attorney? and, (2) if so, did appellant thereafter waive his right to counsel?

In *Miranda*, the Court stated:

"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement[s] he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. *If, however, he indicates in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." (Emphasis added.) *Miranda v. Arizona* (1966), 384 U.S. 436, 444–45, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694.

Although the witnesses at the suppression hearing gave conflicting testimony concerning the language used by appellant in allegedly asserting his right to counsel, the trial court found that appellant "brought up the subject of an attorney" twice, on the second occasion stating, "maybe I should have an attorney." This language brings appellant's assertion within the "indicates in any manner" language set out in *Miranda* as the requirement for an effective assertion of the right to counsel. Thus, the District Court erroneously concluded that appellant did not effectively assert his right to counsel.

[5] We must decide, therefore, if the District Court also erred in concluding that appellant waived his right to counsel after an effective assertion of the right. Although the United States Supreme Court has not yet ruled on the issue, see *Brewer v. Williams* (1977), 430 U.S. 387, 405–06, 97 S.Ct. 1232, 51 L.Ed.2d 424, several of the circuit courts have held a defendant can validly waive the right to counsel after making a request for counsel. *United States v. Rodriguez-Gastelum* (9th Cir. 1978), 569 F.2d 482, cert. denied, 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760; *United States v. Hodge* (5th Cir. 1973), 487 F.2d 945. We hold that this view correctly interprets the situation in Montana and adopt this rule. In so doing, we recognize that a waiver of the right to counsel cannot be presumed and that the State bears a heavy burden to show waiver. *North Carolina v. Butler* (1979), — U.S. —, 99 S.Ct. 1755, 60 L.Ed.2d 286, 292.

[6, 7] Given this standard and the District Court's findings of fact, the District Court did not err in holding appellant waived his right to counsel. The District Court found that the first assertion of the right was made on Sunday morning. After being advised by the police that he could have counsel if he wished, appellant continued answering questions. Thus, appellant voluntarily abandoned his right to counsel at this point and unilaterally resumed the interview without prompting by the interviewing officers. The Sunday interview terminated around noon with no incriminating statements being made by appellant.

The next interrogation session did not begin until Monday evening. Between the interviews more than 30 hours elapsed, including a full business day in which appellant was not detained and was free to consult with family members or an attorney if he wished. Prior to the Monday interrogation, appellant again received his *Miranda* warnings and signed a waiver. During the questioning session, appellant again asserted his right to counsel. With this, the officers stopped questioning appellant and began to leave the room. Appellant resumed talking to the police and they reminded him he had just said he wanted an attorney. Appellant then stated he did not want a lawyer and the interrogation continued.

These facts—particularly the more than 30-hour time span between the first assertion of the right to counsel and any inculpatory statement, the rereading of his *Miranda* warnings and the signing of a waiver before any incriminating statement, and the express statement by appellant that he did not want a lawyer—represent a waiver of the right to counsel on the part of appellant.

[8] The law on the second issue raised by appellant is clear. Recent Montana and United States Supreme Court decisions invalidate section 46-13-301(4), MCA. *Lego v. Twomey* (1972), 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618; *State v. Smith* (1974), 164 Mont. 334, 338, 523 P.2d 1395, 1397. The State must prove the voluntariness of a confession at a suppression hearing by a preponderance of the evidence. If the trial court applied section 46-13-301(4) and required appellant to prove the confession involuntary, it erred.

[9-11] Error by the trial court cannot be presumed but must be shown by the record. *State v. Straight* (1959), 136 Mont. 255, 264-65, 347 P.2d 482. Reviewing the record of the suppression hearing, the trial judge heard arguments by the prosecuting attorney that, while at the trial the State must prove voluntariness, the burden to show the police violated appellant's rights rested on appellant at the suppression hearing. Responding to this argument, the judge stated, "Well, it appears to me that what you say is true. Mr. Volinkaty [appellant's attorney], at the trial, if they wish to introduce this at trial, the burden is on the State to prove voluntariness; however, this is a motion to suppress and I think that, since it is your motion, you should proceed at this time."

This record presents the possibility of two errors by the District Court. First, the trial judge could have erred in requiring the appellant to go forward with the evidence. The federal courts have considered this question on several occasions. Speaking to this issue in a case involving the suppression of wiretap evidence, the Fifth Circuit Court stated:

"(b) *Burdens of proof in suppression hearings.* It is well established that the burdens of production and persuasion generally rest upon the movant in a suppression hearing. [Citations omitted.] Concededly, in some well-defined situations the ultimate burden of persuasion may shift to the government upon an initial showing of certain facts by the defendant. For example, if a defendant produces evidence that he was arrested or subjected to a search without a warrant, the burden shifts to the government to justify the warrantless arrest or search. [Citation omitted.] Or if a defendant shows that a confession was obtained while he was under custodial interrogation, the government then has the burden

of proving that the defendant voluntarily waived his privilege against self-incrimination . . . *even in those situations, the defendant must first discharge his initial burden of producing some evidence on specific factual allegations sufficient to make a prima facie showing of illegality.*" *United States v. DeLa Fuente* (5th Cir. 1977), 548 F.2d 528, 533-534, cert. denied, 431 U.S. 932, 97 S.Ct. 2640, 53 L.Ed.2d 249 and 434 U.S. 954, 98 S.Ct. 479, 54 L.Ed.2d 312.

In *United States v. Crocker* (10th Cir. 1975), 510 F.2d 1129, the trial court denied appellant's motion to suppress a confession. On appeal, the appellant contended the trial court at the suppression hearing improperly required her to assume the burden of proof and of going forward with the evidence. The Circuit Court responded to this argument, saying:

"It is fundamental on a motion to suppress there must be 'a foundation in fact for the legal result.' *Rogers v. Richmond*, 365 U.S. 534, 546, 81 S.Ct. 735, 742, 5 L.Ed.2d 760 (1961). Logic dictates that a pre-trial Motion to Suppress filed by an accused does in fact cast the burden upon the movant to present facts necessary to sustain his position. [Citation omitted.]" *Crocker*, 510 F.2d at 1135.

The court goes on to state:

"While the defendant must first present the evidence in support of his motion to suppress which satisfies his burden of challenging the legality of the confession, we have recognized that the Government *must then* carry the countervailing burden of proving a waiver of the constitutional privilege against self-incrimination." 510 F.2d at 1135.

See also *United States v. Polizzi* (9th Cir. 1974), 500 F.2d 856, 910, cert. denied, 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820.

These cases indicate a trial judge can properly require a party moving for the suppression of evidence to initiate suppression hearing proceedings. The rationale for such a procedure is the requirement that the movant establish a prima facie case that a constitutional infringement has occurred. Once this has been accomplished, the ultimate burden of proving the propriety of the state's action shifts to the state. Thus the District Court here did not err in requiring appellant to present his evidence first at the suppression hearing.

Although allowable, we do not recommend this procedure as standard practice at suppression hearings. The District Courts should employ this procedure only when necessary to establish a prima facie case of infringement by the State. If a prima facie case is presented by the party requesting the suppression of evidence to the trial court's satisfaction through prehearing documentation, the State should be required to initiate the suppression hearing proceedings. This procedure will clearly place the burden of proof on the State as required by *Lego* and *Smith*.

[12-14] The second possible error presented here is whether there was an improper burden of proof put on appellant at the suppression hearing. The above excerpt from the hearing transcript clearly shows the trial judge applied the incorrect standard at the suppression hearing. After hearing the State's argument that appellant was required to prove the confession involuntary, the judge stated he thought that what the prosecuting attorney said was true and required appellant to proceed. As noted above, we find that this required appellant to assume the obligation of going forward with the evidence. It also shifted the burden of proof to appellant.

However, we find here that even though the trial court's ruling did shift the burden, the ruling can be sustained as harmless error. The error here is federal constitutional error. *Lego v. Twomey*, supra; *Jackson v. Denno* (1964), 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908. While not all errors of constitutional magnitude call for reversal, ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705.

In determining the existence of harmless constitutional error, the appellate court considering the question has the task of applying the harmless beyond a reasonable doubt test. *Chapman*, 386 U.S. at 24, 87 S.Ct. 824; see also *Harrington v. California* (1969), 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284; *Schneble v. Florida* (1972), 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340.

Applying this standard to the instant case, we find the error was harmless beyond a reasonable doubt. We are aided in our decision by the rationale expressed in *Rogers v. United States* (5th Cir. 1964), 330 F.2d 535, cert. denied, 379 U.S. 916, 85 S.Ct. 265, 13 L.Ed.2d 186. *Rogers* is another case holding no error exists in requiring a defendant to initiate suppression hearing proceedings. 330 F.2d at 542. In so holding, the court stated:

". . . The burden of producing evidence is never crucial unless certain necessary facts in a case are not aired. *Here all the salient facts were aired.* Few were even in dispute. The defendant, therefore, was not prejudiced by the order in which the evidence was presented. And the district judge allowed defendant's counsel to examine all of the witnesses as hostile. There is no prejudicial error in the record." 330 F.2d at 543. (Emphasis added.)

As in *Rogers*, the trial judge heard all the salient facts at the suppression hearing. The trial court heard testimony from eleven witnesses including appellant, appellant's father, the officers who interviewed appellant, the polygraph examiner, a clinical psychologist, and a learning disabilities specialist. The trial judge allowed appellant's attorney to examine witnesses as adverse in appellant's initial presentation. At the conclusion of the appellant's initial presentation, the State introduced evidence of voluntariness through its own witnesses. When the State rested, the trial court gave appellant the opportunity to present rebuttal testimony. Throughout the proceedings, both sides conducted extensive direct, cross, redirect, and recross examination of the witnesses. In addition to the witness testimony, the trial judge had the benefit of briefs from appellant and the State on the voluntariness question.

After considering all this testimony and the briefs of counsel, the trial judge found the confession voluntary. Given the extensive nature of the proceedings and the full right of appellant to present his case on this issue, we are convinced beyond a reasonable doubt the trial judge would have reached the same result regardless of the improper placing of the burden of proof on appellant. Any error thus constitutes harmless error and does not warrant returning the case to the trial court.

[15] Appellant's arguments concerning the third issue lack merit. Regarding the sufficiency of evidence to support a guilty verdict, this Court has said:

"On appeal we examine the evidence to determine whether the verdict is supported by substantial evidence. In doing so, we view the evidence in the light most favorable to the State." *State v. Merseal* (1975), 167 Mont. 412, 415, 538 P.2d 1366, 1368.

Beyond the confession, the State presented evidence that placed appellant with the victim about three blocks from the scene of the murder near the probable time of the murder. Appellant could not explain his whereabouts at the time the murder probably occurred. Appellant had told his brother, "I think they're going to get me for the murder" before the police even questioned him about the homicide. And, appellant had borrowed his brother's shoes the morning after the murder because his own were wet, even though every witness who was with appellant and the victim on the night of the murder agreed that appellant had not walked near any water. This evidence, when viewed in the light most favorable to the State, as we must do when the State prevails at the trial level, sufficiently supports appellant's conviction on the charge of deliberate homicide.

For the foregoing reasons, we affirm the judgment of the District Court.

HASWELL, C. J., and DALY, J., concur.

SHEEHY, Justice, dissenting:

This is the kind of case that is guarantied to add gray hairs to an already graying judge's head. The record discloses a strong possibility that defendant Larry Lynn Blakney is guilty of deliberate homicide in the murder of Ann Thibodeau. But the record also discloses a strong possibility that the confession uttered by Larry Lynn Blakney was involuntary, was obtained with indicia of coercion, and the District Court put the burden of proof with respect to voluntariness upon the wrong party at the suppression hearing. Reversal means further expense to the county and a possible loss of a conviction. Affirmance means that Blakney's constitutional rights must be explained away, and places our approval on the procedure that led to the confession. Therefore, I come down on the side of reversal.

The circumstances surrounding the confession need some further elaboration. The body of Ann Thibodeau was found at approximately 9:00 p. m. on Saturday, June 11, 1977 in the Clark Fork River, near downtown Missoula. Blakney, at the officer's request, went to the Missoula police station at 10:30 p. m. that evening. He was interrogated beginning at approximately 11:30 p. m. for one and one-half hours. Following the interrogation, which was recorded, Blakney was taken to his home by interrogating officers, where his car was searched pursuant to his consent. They also were shown the interior of Blakney's home. They broke off contact with him at 2:00 a. m. on the morning of June 12, 1977. Arrangements were made at that time for Blakney to come into the police station that morning at approximately 9:45 a. m. for a second interview.

This second interview on June 12, 1977, lasted approximately two to two and one-half hours. Again the interrogation was conducted in the police interrogation room in the presence of two police officers. At this interrogation arrangements were made for Blakney to take a polygraph examination on the following day at a time to be agreed upon. Although the testimony of the officers is inconsistent about the matter, it is conceded by the two officers and it was found by the trial court that some type of request for an attorney was made by Blakney during the interrogation of June 12.

On Monday, June 13, 1977, Blakney went to the police interrogation room to undergo the polygraph examination. It was conducted by a Cascade County deputy. The examination commenced at approximately 9:15 p. m. and was conducted in the presence of four police officers, including the polygraph examiner. Since Blakney's father had gone on vacation the previous day, his uncle came to the police station with him. When the polygraph examination began, the uncle was seated at an open door outside the interrogation room and was able to hear the first few questions of the polygraph examination. The examiner shook his head in the negative, said something to another police officer, who then suggested to the uncle that he remove himself, or go upstairs to get a soft drink or something. The uncle did this, and when he attempted to return to the interrogation room, found the door to the basement, through which he had come, locked. He waited there until the polygraph interrogation was completed at which time an officer came out to the uncle to tell him that the boy "was confessing." During the polygraph examination, the young defendant was seated facing the wall, and on the table near him were spread out parts of the police file, but particularly a dozen or so pictures of the nude body of Ann Thibodeau. When the polygraph examiner had finished his examination, he removed the chart from the machine, and placed the defendant behind him, showed to the defendant, the polygraph chart recording of a "known lie". The examiner then went on to state by showing other "highs" in the chart, that Blakney was lying. Blakney testified that the polygraph examiner said "well, I've got some daughters of my own, I wouldn't want the same thing to happen to them as what happened to Ann." Blakney also testified that the examiner told him that the examiner would take the polygraph test and flash it up on a big

screen in front of the jury and would show the jury the places where the examiner maintained that Blakney lied.

The testimony of the polygraph examiner in this regard is as follows:

"Q. After Larry came over and you reviewed the results, did you make any statements to Larry at that time? A. Yes, I did. I told him I thought it would probably be best if he leveled with the authorities and told them what happened.

"Q. Are you married? A. Yes.

"Q. Do you have any children? A. Yes.

"Q. And are they boys or girls? A. I have two boys, one 19 and one 16.

"Q. No girls? A. No.

"Q. Did you make a statement to Larry at that time that you had a couple of daughters and you didn't want this happening to them? A. Okay. To clarify what I am talking about—and talking about marriage—on my first marriage, I have two sons by my first marriage. On my second marriage, I have two daughters, stepdaughters, and that's true.

"Q. Did you make a statement to that effect, that you knew he was lying and that you didn't want this to happen to your daughters? A. I'm not going to say that I made that statement. I honestly don't remember.

"Q. Can you honestly say that you did not make the statement? A. No. I wouldn't honestly say that.

"Q. Did you make any other statements to him? A. Yes, I did. Before we first started the exam, when we went over the advisement of rights, and also the waiver of rights on the bottom, made it very plain to Larry, and asked him if he knew that this was being done voluntarily on his part, and that the polygraph results cannot be used against him in the State of Montana.

"Q. Did you make a statement to Larry after the test was concluded of something to the effect that you were going to put the results of the test on a screen and have it shown to a jury and he would be found guilty of deliberate homicide? A. No.

"Q. Did you make any statement that was similar to that? A. To the best of my knowledge, no.

"Q. Did you make any other statement, other than possibly one about the daughters, concerning either the use of the results or Larry's involvement in the crime? A. Yes, I probably did, because in most cases, I'll tell you them that, if it is stipulated that the results can be used, but only if his attorney and the prosecuting attorneys will stipulate it, that the results can be used."

Immediately following this, the two officers who originally interrogated Blakney came back into the room. Blakney testified that they told him they knew that he did it and that he ought to tell everything. At this point, Blakney testified that he again requested an attorney. The officers testified that he made such a request but that then he went on talking and so nothing further was done about it. Blakney testified that he assumed that because they continued interrogating him that he was not going to get an attorney at that time.

At this point, according to the testimony of the officers, Blakney, who was concerned about what a confession would mean to members of his family, was assured that it was a good thing for him to do and that the family would understand. With that, Blakney confessed to the murder. Later he gave a further confession that was taped or recorded.

The evidence concerning the actual confession reveals a very emotional scene. It is this evidence and testimony that leads me to conclude that Blakney probably committed the murder. But the testimony in evidence leading up to the confession also forces me to conclude that his constitutional rights against self-incrimination and his right to counsel were overridden.

Of course, if the first real confession was unconstitutionally brought about, then the second confession is likewise inadmissible. In any event, in considering the voluntariness of a confession, its truth or falsity is not to be considered. *State v. White* (1965),

146 Mont. 226, 405 P.2d 761; cert. den. 384 U.S. 1023, 86 S.Ct. 1955, 16 L.Ed.2d 1026. Where a confession is given in the absence of counsel, the underlying test of admissibility of confession is whether it is given voluntarily, and with the defendant's free will. *State v. Lucero* (1968), 151 Mont. 531, 445 P.2d 731; *State v. Noble* (1963), 142 Mont. 284, 394 P.2d 504.

The majority opinion tacitly concedes that the evidence respecting voluntariness is close, and that there is evidence which would support either side of the issue. It is further clear from the record, that the District Court assumed that it was bound by the provisions of section 46-13-301(4), MCA, that the "burden of proving that a confession or admission was involuntary shall be on the defendant." This is the first case where the Montana Supreme Court directly invalidates that portion of section 46-13-301(4), MCA. This Court had, however, in *State v. Smith* (1974), 164 Mont. 334, 338, 523 P.2d 1395, stated that the rule in Montana was that the state must prove the voluntariness of a confession by a preponderance of the evidence. This rule was also enunciated in *State v. LaFreniere* (1973), 163 Mont. 21, 27, 515 P.2d 76.

The majority opinion concludes that the District Court did in fact apply an incorrect standard by placing the burden of proof upon Blakney to prove the involuntariness of his confession. Having so concluded, the majority goes further and determines that the mistake of the District Court constituted harmless error beyond a reasonable doubt. On that point, I must disassociate myself from the majority.

I cannot agree with the majority that the evidence of voluntariness was harmless beyond a reasonable doubt. I am not mentally agile enough to make that syllogistic leap. In my opinion, when the District Court concluded that Blakney did not carry his burden of proof, a burden he did not have under a correct version of the law, the District Court committed error beyond a reasonable doubt.

To clarify my position, I find no particular significance or error in the fact that Blakney was required to put his evidence on first at the suppression hearing. The correct procedure at suppression hearings calls for the defendant to put his case on first, at least to establish a *prima facie* case of involuntariness, because otherwise his motion would be defeated if no evidence were given on either side. Once the *prima facie* case has been established the burden of persuasion shifts to the State to prove the voluntary character of the confession.

I also want to make clear that I have stated the rule in Montana that voluntariness must be proved by the State by a preponderance of the evidence, only because the rule is *stare decisis*. I disagree with the holding of this Court in *State v. LaFreniere*, supra, which refused to adopt the standard of proof respecting voluntariness as beyond a reasonable doubt. Our court was following a decision in *Lego v. Twomey* (1972), 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618, 626, 627. There, the United States Supreme Court decided that proof beyond a reasonable doubt of the voluntariness of a confession was not constitutionally required. When the logic of the nine men in Washington in reaching a decision does not hold water, and we are not bound by the decision, we should not follow it blindly. The United States Supreme Court reached the preponderance rule in such cases upon the reasoning that "the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts . . . ." 404 U.S. at 486, 92 S.Ct. at 625. That reasoning is demonstrably wrong; it is precisely to assure the reliability of the jury verdict that suppression hearings are permitted. In fact, before the jury is permitted to hear a confession, the trial court is first required to determine that the confession is in fact voluntary. *Jackson v. Denno* (1964), 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908. In Montana, by statute, the issue of the admissibility of the confession is not to be submitted to the jury. Section 46-13-301(5), MCA. When one considers that every element of the crime must be proved beyond a reasonable doubt (section 26-1-403(2),

MCA) the catastrophic effect of permitting a jury to hear a confession of the defendant, the admissibility of which is determined on a basis less than beyond a reasonable doubt, cannot be debated. California has moved away from the United States Supreme Court in this regard, and has held that the privilege against self-incrimination is so fundamental, and so highly regarded judicially, that the reasonable doubt standard presents the greatest chance of excluding involuntary confessions. *People v. Jimenez* (1978), 21 Cal.3d 595, 147 Cal.Rptr. 172, 580 P.2d 672.

Persuasive to the California court was the fact that once a confession is determined by the trial court to be voluntary and therefore admissible, the jury does not redetermine the voluntariness issue, and the appellate court is bound to accept the trial court's resolution of conflicting evidence, unless it is so improbable as to be entirely unworthy of belief. *Jimenez*, supra, 147 Cal.Rptr. at 178, 580 P.2d at 678. The same situation exists in Montana. Under our code section above cited, the jury does not determine the issue of admissibility. On appeal this Court has held invariably that the District Court's decision as to admissibility is practically inviolate. *State v. Smith* (1974), 164 Mont. 334, 523 P.2d 1395; *State v. Chappell* (1967), 149 Mont. 114, 423 P.2d 47; *State v. White* (1965), 146 Mont. 226, 405 P.2d 761. Again, it offends my syllogistic power to find consistency in a rule which requires proof of elements of a crime beyond a reasonable doubt but which allows a confession, against the defendant's constitutional right of no self-incrimination, to be proved by a lesser standard.

Finally, it is my conclusion that Blakney was denied his *Miranda* rights with respect to counsel. The majority opinion finds that he effectively asserted his right but that he waived the same. It is true that the United States Supreme Court has held that the State bears a "heavy burden" to show waiver of right to counsel. *North Carolina v. Butler* (1979), 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286, 292. I am frank to state that I don't know what a "heavy burden" is but I think it should be nothing less than beyond a reasonable doubt. Here again that standard has not been met in this case.

I would reverse and remand, at least for a proper hearing as to the voluntariness of the confession.

SHEA, Justice, dissenting:

I would reverse the conviction. I cannot in good conscience abide by the bald conclusion of the trial court after a hearing on a motion to suppress, that the confession was voluntary and that defendant was not denied his right to counsel.

I agree with the factual recitation and conclusions reached by Justice Sheehy in his dissent, although I am not convinced at this time that we should adopt the California standard that the State must prove beyond a reasonable doubt that a confession is voluntary before it can be introduced against him at trial. *People v. Jimenez* (1978), 21 Cal.3d 595, 147 Cal.Rptr. 172, 580 P.2d 672. I am not convinced, on the other hand, that the present preponderance of the evidence should be the proper standard. Rather, I believe that the State should be required to prove by clear and convincing evidence that the defendant's confession was voluntary. The standard of beyond a reasonable doubt is too stern, and the standard of preponderance of the evidence is too elusive or vaporous. It is too flexible a standard by which to judge something so fundamental as a constitutional right.

Justice Sheehy does not agree, furthermore, that it was harmless error beyond a reasonable doubt to require the defendant to prove the involuntariness of the confession. Nor do I. Should a defendant challenge the voluntariness of his confession, it is his duty to raise the issue by an appropriate motion to suppress with specific contentions; but once those allegations are made it is the duty of the State to proceed first with its case to prove that the confession was voluntary. Only if the State establishes a prima facie case of voluntariness by the standard of clear and convincing evidence should the defendant be required to come forward with his own evidence disputing

the State's claim. That was not done here, and regardless of the standard used, it is clear that the trial court in effect placed the burden on the defendant to prove that the confession was involuntary and to prove that he was denied his right to counsel. The record demonstrates that the trial court was under the mistaken assumption it was the defendant's duty to prove involuntariness of the confession and nonwaiver of counsel rather than the duty of the State to prove a voluntary confession and waiver of counsel.

In setting forth the wide latitude to be given a trial court in assessing and weighing the evidence, the majority refers to *Grimestad* where we simply repeated the time worn rule which applies to virtually all factual determinations by a trial court. The majority then proceeds to apply *Grimestad* to this case by stating:

"The trial court here reviewed the evidence and determined appellant voluntarily confessed. In considering almost every one of the factors listed above as relevant in determining the voluntariness of appellant's confession, evidence exists supporting the holding of the District Court."

I do not dispute that evidence exists supporting the holding of the trial court, but if a standard other than the virtually meaningless one of preponderance of the evidence (in the context of this case) were applied, the trial court would have been required to find that the State did not prove the confession voluntary and a waiver of counsel by clear and convincing evidence.

The majority then proceeds to discuss the evidence as to each of the factors. The essential problem is, however, that another trial judge, if he was so inclined (let us say if he had philosophical leanings different then those of the trial judge concerning the right to counsel and obtaining confessions), could have taken the opposite position, and concluded, with adequate support in the record, that the State did not prove that the confession was voluntary and that the State did not prove that defendant waived his right to counsel. This decision of the trial court would have looked just as good in print, although not nearly as well accepted by the public.

Viewed in the abstract, this deference given to trial court decisions on the facts is nice-sounding; it gives the distinct impression that the appellate court is not meddling in the factual determinations of the trial court. I would also like to believe that we could, with full assurance, give this kind of deference to the trial court and its fact-finding functions. We refer to this rule constantly when we uphold a decision of the trial court as to its factual determinations.

Aside from the improper standard applied in this case (it should be at least by clear and convincing evidence), the problem in this case is in applying this rule of deference to a situation where there is no indication that the trial court listened carefully to the evidence, carefully evaluated the evidence, and then came to the proper conclusions by a careful application of the law to the facts as it perceived them to be. We are giving only lip service to one's constitutional rights if we do not require this of trial courts in reviewing their rulings on factual questions relating to alleged constitutional violations.

How do we know, for example, that in this case after the motion to suppress was taken under advisement, if the trial court took five minutes in considering the case before reaching its decision, or whether it took fifteen hours in considering the case before it reached its decision? This is not necessarily to say that a five minute consideration would automatically be inadequate or that a fifteen hour consideration would be adequate. But, it can be safely stated that, regardless of the decision, if one knew the trial court considered the case for fifteen hours before reaching its decision, it would at least indicate that it had carefully considered the case.

It goes without saying that when this Court reviews decisions of a trial court, it is helpful that we know how the trial court perceived the facts if it is making a factual determination, and how it applied the law to the facts. It is most important when the

issue involves a claimed violation of a fundamental right such as is involved here. Unfortunately, it is more often the case than not, that this Court does not receive any meaningful insight as to how and why a trial court reached a decision. The general rule seemingly applied by the trial courts is that the less it says about the facts, and how it applied the law to the facts, the better its chance will be that its decision will be upheld on appeal. That situation exists in this case, but it is much more serious. Here, the only findings of fact and conclusions of law involved, are those prepared by the County Attorney after the trial court had reached its decision, and which were then given to the trial court, to sign. We perhaps get some insight as to what the prosecutor perceived the facts to be and the appropriate conclusions to draw from those facts, but it adds absolutely nothing to the legitimacy of the trial court's decision.

Had it not been for the after-the-decision suggestion of a law school intern then working for the Missoula County Attorney, there would not have been any findings and conclusions entered in this case. This important revelation was first unearthed during the oral arguments before this Court. The prosecutor explained the circumstances.

This Court was questioning the prosecutor as to whether the trial court had entered a memorandum in support of its decision or had entered findings of fact and conclusions of law. In reply, the prosecutor revealed that after the trial court had taken the suppression motion under advisement, it later notified the County Attorney's office that it had entered an order denying the defendant's motion to suppress, or was about to enter such an order. It was then that the law student suggested to the prosecutor that it would be a good idea if the prosecutor presented the trial court with findings and conclusions in support of its order. The prosecutor agreed that this was a wise suggestion and, accordingly, prepared findings and conclusions and presented them to the trial court for signature. The trial court adopted verbatim the findings and conclusions; indeed, the order in which the findings and conclusions appear is exactly the same document presented by the prosecutor. Thus, the only findings and conclusions before this Court for review are those prepared by and tailored by the prosecutor.

The trial court had not requested proposed findings and conclusions from either side. Presumably, therefore, if the trial court did so at all, it was going to prepare and enter its own. At least the defendant would naturally believe this being that the trial court requested no findings or conclusions from either side. Counsel for defendant at the hearing on the motion to suppress is not the same counsel as argued this appeal, and I imagine it will come as quite a revelation to him as to the background leading up to the tailored findings and conclusions signed by the trial court.

The majority, of course, has carried the day, but I would not give one ounce of weight to findings and conclusions prepared, presented, and signed in this manner. To conclude, as the majority has, that all this deference should be given to the decision of the trial court in listening to, weighing and evaluation of the evidence, is an exhaltation of form over substance in the highest degree.

Defendant did not have his fair day in court on the motion to suppress because of the trial court's erroneous ruling placing the burden on the defendant. This error was compounded by the strange decision-making process used in this case. Where the findings were tailored by the prosecutor after the decision was made, and with no opportunity for the defendant to participate, how can anyone in good conscience believe that the trial court fairly received and evaluated the evidence and applied the law in a fair and even-handed manner?

Assuming that the revelations of the prosecutor did not come to light during oral arguments, and that this Court believed that the findings and conclusions were those of the trial court alone, if we had a standard of review of questions of this nature requiring the State to prove by clear

and convincing evidence rather than by the preponderance of the evidence, the evidence would have required this Court to reverse the District Court. By not adopting a more stringent standard, we are only encouraging trial courts to be as vague as possible in reaching their decisions on questions involving fundamental constitutional rights.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 14534

STATE OF MONTANA,

Plaintiff and Respondent,

vs.

LARRY LYNN BLAKNEY,

Defendant and Appellant.

O R D E R

PER CURIAM:

The petition for rehearing of defendant and appellant is denied.

DATED this 10th day of January, 1980.

Frank I. Haswell
Chief Justice

John Conway Harrison
Gene B. Daly
Justices

Mr. Justice Sheehy concurs in the denial of rehearing although he does not agree with the decision itself as expressed in the opinion herein.

Justice

Mr. Justice Daniel J. Shea would grant a rehearing.

Daniel J. Shea
Justice

FILED
JAN 10 1980
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA.

Cause No. 5067/53

STATE OF MONTANA,

Plaintiff,

vs.

LARRY LYNN BLAKNEY,

Defendant.

FILED NOV 21 1977
LEA D. LaFRINIERE, Clerk
By Emmie J. Henri
Deputy

FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER DENYING MOTIONS TO SUPPRESS EVIDENCE AND FOR CHANGE OF VENUE.

The defendant has filed a Motion to Suppress certain evidence and for a Change of Venue. A hearing on the Motion to Suppress was commenced on November 1, 1977 and continued thereafter from time to time until November 15, 1977. At all times the defendant was personally present and represented by his counsel, Richard Volinkaty and Arthur B. Harr, with the State being represented by Missoula County Attorney Robert L. Deschamps III. The Court now being fully informed, makes the following:

FINDINGS OF FACT

1. That the defendant was interviewed by the police three times with the last interview being preceeded by a polygraph examination. The first interview began at 11:23 p.m. on June 11, 1977 and finished about 12:56 a.m. on June 12; the second interview began at 9:51 a.m. on June 12 and ended sometime between noon and 1:00 p.m.; the third and final interview began at 9:20 p.m. on June 13 and finished around 10:45 p.m. on the same date.

2. That the defendant always had a close relative either with him or nearby during each of his interviews with the police,

27-002

and on several occasions during breaks in the interviews, the defendant privately consulted with these relatives.

3. That between each interview the defendant was allowed to return home, with the time for the next interview session being mutually agreed upon by the defendant and the interviewing officers.

4. That the defendant was thoroughly instructed on his "Miranda" rights prior to each interview and on each occasion, after having any questions answered, he acknowledged he understood his rights and signed a written waiver of his rights.

5. That the defendant has an I.Q. of 94; has attended high school and a vocational technical center; has passed four-fifths of the grade equivalency diploma (G.E.D.) examination; and has demonstrated an adequate adult command of the English language during police interviews and in his courtroom testimony.

6. That a tape recording of the defendant's polygraph examination clearly indicates that the defendant was not threatened or intimidated by the procedures used.

7. That on two occasions the defendant brought up the subject of an attorney. The first occasion was during the June 12 interview when the defendant asked the police if they thought he should get an attorney, to which the police responded that this decision was up to him. After receiving this advice the defendant voluntarily resumed talking to the police.

The second occasion was after the polygraph examination on June 13 when the defendant stated "Maybe I should have an attorney". With this, the police stopped talking to the defendant and began to leave the room, but before they were able to leave the defendant resumed talking to them. At this point, the defendant was reminded that he had just indicated he wanted an attorney, to which the defendant responded that he did not

want a lawyer. With this the interview continued.

8. That the defendant was not in police custody for a day and one-half between his first mention of an attorney and his next interview, but during this time made no effort to secure or consult with an attorney.

9. That no facts have been offered showing actual prejudice in the community against the defendant.

From the foregoing findings of fact, the Court now makes its:

CONCLUSIONS OF LAW

1. That the defendant was competent to understand his constitutional rights and intelligently and knowingly waived them.

2. That the statements made by the defenant were voluntary and were therefore not gained in violation of his constitutional rights.

3. That the defendant never made an effective assertion of counsel and in any event thereafter knowingly and intelligently waived the presence of counsel by spontaneously stating he did not want a lawyer and resuming talking to the police.

4. That the court cannot determine that there is any actual prejudice in the community against the defendant thereby precluding him from having a fair trial.

From the foregoing findings of fact and conclusions of law, the court now orders as follows:

1. The defendant's Motion to Suppress is denied.

2. The defendant's Motion for Change of Venue is denied, subject to being renewed at the time of trial should the jury selection process reveal actual prejudice against the defendant

precluding him from having a fair trial in Missoula County.

Done this 21st day of November, 1977.

Jack L. Green

District Judge

21-1/87

95-1805. Motion to suppress confession or admission. (a) A defendant may move to suppress as evidence any confession or admission given by him on the ground that it was not voluntary.

(b) The motion shall be made before the trial unless for good cause shown the court shall otherwise direct.

(c) The defendant shall give at least ten (10) days' notice of such motion to the attorney prosecuting or such other time as the court may direct. The defendant shall serve a copy of the notice and motion upon the attorney prosecuting.

(d) The motion shall be in writing and state facts showing wherein the confession or admission was involuntary.

(e) If the allegations of the motion state facts which if true, show that the confession or admission was not voluntarily made the court shall conduct a hearing into the merits of the motion.

(f) The burden of proving that a confession or admission was involuntary shall be on the defendant.

(g) The issue of the admissibility of the confession or admission shall not be submitted to the jury. If the confession or admission is determined to be admissible the circumstances surrounding the making of the confession or admission may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession or admission.

(h) If the motion is granted the confession or admission shall not be admissible in evidence against the movant at the trial of the case.

History: En. 95-1805 by Sec. 1, Ch. 196, L. 1967.

46-13-301. Motion to suppress confession or admission. (1) A defendant may move to suppress as evidence any confession or admission given by him on the ground that it was not voluntary. The motion shall be in writing and state facts showing wherein the confession or admission was involuntary.

(2) The motion shall be made before the trial unless for good cause shown the court shall otherwise direct.

(3) The defendant shall give at least 10 days' notice of such motion to the attorney prosecuting or such other time as the court may direct. The defendant shall serve a copy of the notice and motion upon the attorney prosecuting.

(4) If the allegations of the motion state facts which, if true, show that the confession or admission was not voluntarily made, the court shall conduct a hearing into the merits of the motion. The burden of proving that a confession or admission was involuntary shall be on the defendant.

(5) The issue of the admissibility of the confession or admission shall not be submitted to the jury. If the confession or admission is determined to be admissible, the circumstances surrounding the making of the confession or admission may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession or admission.

(6) If the motion is granted, the confession or admission shall not be admissible in evidence against the movant at the trial of the case.

History: En. 95-1805 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1805.

AMENDMENTS

TO THE

CONSTITUTION OF THE UNITED STATES

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT 6

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT 14

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, including Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

3. No person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations, and claims shall be held illegal and void.

5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE II

Section 17. Due process of law. No person shall be deprived of life, liberty, or property without due process of law.

Section 23. Detention. No person shall be imprisoned for the purpose of securing his testimony in any criminal proceeding longer than may be necessary in order to take his deposition. If he can give security for his appearance at the time of trial, he shall be discharged upon giving the same; if he cannot give security, his deposition shall be taken in the manner provided by law, and in the presence of the accused and his counsel, or without their presence, if they shall fail to attend the examination after reasonable notice of the time and place thereof.

Section 24. Rights of the accused. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same.

Section 25. Self-incrimination and double jeopardy. No person shall be compelled to testify against himself in a criminal proceeding. No person shall be again put in jeopardy for the same offense previously tried in any jurisdiction.

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OCTOBER TERM, 1979

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NO. 79-6366

LARRY LYNN BLAKNEY,

Petitioner,

-vs-

STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Montana

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner,

-vs-

STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Montana

RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of Montana respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Montana Supreme Court's opinion in this case. That opinion is reported at 605 P.2d 1093.

REASONS WHY THE WRIT SHOULD BE DENIED

The Issues Raised by The Petitioner Are Not Sufficiently Significant To Warrant This Court's Review.

The petitioner's first contention is that he was denied due process because of the ruling by the Montana Supreme Court that it was harmless error to shift the burden of proof to petitioner at the hearing on the voluntariness of his confession. This issue does not present a substantial federal question because the ruling was confined to facts and circumstances peculiar to the petitioner's case.

In the state supreme court, the petitioner challenged the constitutionality of section 46-13-301(4) of the Montana Code Annotated. The statute provides that the burden of

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proving that a confession is involuntary is on the defendant. At the petitioner's suppression hearing, the prosecution relied on the statute and argued its applicability to the district court judge. In reviewing the proceedings against the petitioner in this case, the Montana Supreme Court explicitly declared section 46-13-301(4) unconstitutional, correctly basing its holding on this Court's decision in Lego v. Twomey, 404 U.S. 477, 489 (1972). State v. Blakney, 605 P.2d 1093, 1098 (1979). The Montana Supreme Court further specifically declared that the State is required to prove a confession voluntary by a preponderance of the evidence. Id. Because of these holdings by the state supreme court, the challenged statute and the impermissible burden of proof as to voluntariness will no longer be applied to defendants attacking their confessions in Montana courts. Any error that might have occurred on this issue in the proceedings under review affected only the particular petitioner now before the Court.

Furthermore, the Montana Supreme Court's holding that it was harmless error for the trial court to require the petitioner to carry the burden of proof as to voluntariness was based exclusively on the facts of this case. The court carefully reviewed the entire record of the suppression hearing, the procedure undertaken by the trial judge, the extensive evidence presented by both the State and the petitioner on the issue of voluntariness, and the detailed factual findings made by the lower court. Applying the test pronounced and approved by this Court in Chapman v. California, 386 U.S. 18, 24 (1967), the state supreme court then held that the impermissible burden of proof placed on the petitioner was harmless beyond a reasonable doubt. State v. Blakney, 605 P.2d at 1100. This holding of the Montana Supreme Court, premised as it was entirely on the

record and facts of the petitioner's hearing, has no impact outside the limits of this case. Therefore, certiorari should be denied on the first issue presented by the petitioner.

Likewise, the second issue raised by the petitioner, on the existence of a valid waiver of the right to counsel, is not of sufficient significance to warrant the granting of discretionary review by this Court. As a general rule, constitutional rights may be waived, so long as the waiver is made intentionally and knowingly. Brewer v. Williams, 430 U.S. 387, 403 (1977). The question of waiver, even when the right to counsel is involved, depends upon the particular facts and circumstances of the case. North Carolina v. Butler, 441 U.S. 369, 374-75 (1979). Therefore, unless this Court should rule for the first time that the right to counsel may never be waived once it has been asserted, the determination of the existence of a waiver of the right to counsel must be based solely on the facts and evidence in the individual case.

Both the district judge and the Montana Supreme Court examined and addressed the issue of whether the State had shown a waiver of the right to counsel by the petitioner. Each court determined, after a thorough review of the facts and circumstances of the case, including the petitioner's background, experience, and conduct, that he had understood his right to representation and had voluntarily waived it. State v. Blakney, 605 P.2d at 1097-98; Findings of Fact 1-9, Appendix B to Petition. These factual findings by the state courts are entitled to great weight. The petitioner here is merely seeking one more review of a question turning entirely on the facts of this case, a question that has already been resolved twice in favor of the respondent. Under these circumstances, a grant of certiorari on the petitioner's second issue is not warranted.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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-vs-

STATE OF MONTANA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S
BRIEF IN OPPOSITION

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ATTORNEYS FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

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LARRY LYNN BLAKNEY,

Petitioner,

-vs-

STATE OF MONTANA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

In its brief in opposition to petitioner's petition for writ of certiorari, respondent essentially argues that neither of the issues tendered by petitioner as justification for issuance of the writ are of such significance in application as to warrant issuance of the writ.

In reference to petitioner's first issue, respondent's argument suggests tacit acknowledgment of petitioner's contention that the Montana Supreme Court acted improperly in holding harmless error occured when petitioner was required to carry the burden of proof during hearing on his motion to suppress. However respondent contends that such action will not occur again given the discussion of the court in State v. Blakney _____Mont. _____, 605 P.2d 1093 (1979). Thus, respondent maintains that the application of the ruling is so narrow in scope that no substantial federal question exists.

In reference to petitioner's second issue, respondent claims that the question of waiver of right to counsel was thoroughly examined by the Montana courts and resolved in respondent's favor and thus, further review of a largly

factual determination is all that is sought by petitioner.

Rule 19, Revised Rules of the Supreme Court of the United States provides in pertinent part:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> > "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Construction of this rule was the focus of the Court's attention in Rice v. Sioux Memorial Park Cemetery, Inc. et al., 349 U.S. 70 (1955). Here the court noted that its function was not to review for the benefit of individual litigants and that "special and important resons" must exist for the granting of the writ. The Court stated that " '[s]pecial and important reasons' imply a reach to a problem beyond the academic or the episodic." 349 U.S. at 74.

The Court in Rice also quotes approvingly from the earlier case of Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387. (1923) where the Court, in dismissing proceedings for a writ of certiorari which had been granted stated:

> "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . ."

261 U.S. at 393.

The instant case does not present a situation, as did Rice, supra, where the issue for review was effectively rendered moot before conclusion of the proceedings on the

writ. Neither does the case involve determination of issues so narrow in application as to be significant only to the parties; the importance of resolution to the petitioner is patently obvious. Rather, petitioner submits that the decision of the Montana Supreme Court in State v. Blakney _____Mont._____, 605 P.2d 1093 (1979) suggests a tenor of constitutional interpretation which is contrary to the spirit and essence of prior decisions of this Court and smacks of a developing pattern of constitutional disregard which should be halted and reversed in its incipient stages. If the Supreme Court of Montana is permitted to hold, as it did here, that a ruling flatly contrary to an established and well defined body of case law governing burden of proof, is harmless error beyond a reasonable doubt and further, that conflicting, contradictory and impeachable testimony is all that is needed to sustain the state's heavy burden of showing waiver of right to counsel, the significance of the detriment to these and other constitutional rights in future Montana cases is apparent, albeit necessarily conjectural. It is difficult to conceive of a more lucid example of state court action "not in accord with applicable decisions of this court" than that supported by the decision and record in the instant case.

Respectfully submitted,

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